



IN THE HIGH COURT OF HIMACHAL PRADESH AT SHIMLA

Civil Revision No.19 of 2025

Reserved on : 25.6.2025

Decided on : 8.7.2025

Dalip Singh and another

.....Petitioners

Versus

Khatri Ram and another

.....Respondents

Coram:

The Hon'ble Mr. Justice Vivek Singh Thakur, Judge.

Whether approved for reporting? Yes.

For the Petitioners : Mr. Atul G. Sood, Advocate.

For the respondent : Ms. Radhika Gautam, Advocate, for respondent No.1.

Respondent No.2 – exparte vide order dated 14.5.2025.

Vivek Singh Thakur, Judge

This Revision Petition has been preferred under Section 115 of the Code of Civil Procedure (CPC) against the order dated 6.2.2025, passed by Additional District Judge, Paonta Sahib, District Sirmour, Himachal Pradesh, in CMA Registration No.1 of 2025, titled as Dalip Singh and another v. Khatra Ram and another, whereby application preferred by defendants (present petitioners), under Order 26 Rule 9 CPC read with Section 151 CPC, has been dismissed.

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2. For convenience, parties hereinafter shall be referred as per their status before the trial Court, i.e. petitioners herein as defendants and respondent No.1 herein as plaintiff.

3. Plaintiff filed a suit for recovery of ₹7,00,000/- as damages from the defendants, i.e. defendants and proforma respondent No.2 herein, on account of damage/loss caused to the house of plaintiff by illegal digging below and adjacent to the house of plaintiff.

4. After completion of pleadings, issues were framed and evidence was led before the Trial Court. Plaintiff examined three witnesses and the defendants examined four witnesses.

5. Plaintiff had placed reliance on copies of Jamabandi (Ex.PW-1/B, Ex.PW-1/D), Site Plan (Ex.PW-3/A), Valuation Report (Ex.PW-3/B), Technical Report (Ex.PW-3/C), Rent Receipts (Ex.P-1 to Ex.P-26), Photographs (Ex.P-1 to Ex. P-7); and defendants had placed reliance on copy of Jamabandi (Ex. DW-3/A and Aks Tatika (Ex.DW-3/B)

6. On conclusion of trial, the Trial Court decreed the suit filed by the plaintiff, partly, by passing a decree, dated 26.2.2020, for recovery of ₹7,00,000/- as damages on account of damage/loss caused to the house of the plaintiff.

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7. Being aggrieved by the judgment and decree of the Trial Court, defendants No.1 and 2 preferred an appeal before the first Appellate Court, which is pending adjudication before Additional District Judge, Paonta Sahib, District Sirmour, Himachal Pradesh.

8. On 3.8.2024, defendants No.1 and 2 filed an application under Order 26 Rule 9 CPC read with Section 151 CPC for appointment of Local Commissioner, i.e. any SDO (Civil) from Public Works Department (Building & Roads), either in office or retired, to inspect the spot and report about the condition of existing building and its location and age of building, material used therein.

9. For filing the application at this belated stage, an explanation has been given that defendant (applicant) is illiterate person and was never advised to get the spot inspected from a Civil Engineer, without which expert opinion and report, defendants were unable to put forth their claim clearly and categorically before the Trial Court, but, on perusal of file, it transpired that, for lack of proper expert assistance and advice, huge damage was suffered by poor defendants, who themselves were earning their livelihood by doing work of mason etc. and earning hand to mouth.

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10. It was canvassed on behalf of defendants that the report of Local Commissioner would help the Court to reach at a right conclusion and to adjudicate the lis clearly and effectively and it will cause no injustice or prejudice to the opposite party.

11. It has further been submitted that appointment of Local Commissioner to inspect the spot and report about the nature, location and exact alleged loss is necessary, which was not disclosed by the expert produced by the plaintiff purposely, and with report of Local Commissioner the Court would be able to ascertain complete and comprehensive situation on the spot to decide the controversy involved in the case.

12. The application was opposed by the plaintiff on the ground that appointment of Local Commissioner after 12 years of filing the suit will serve no purpose and shall be of no help to the Court to adjudicate the matter in controversy, particularly when there is already a report of the expert witness regarding condition and situation on the spot and condition of the building at relevant point of time. It has been further submitted that unless the said report is set aside, no fresh Local Commissioner can be appointed and

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now, at this stage, defendants cannot be allowed to create evidence in their favour with the help of the Court.

13. Learned counsel for the defendants has submitted that the first Appellate Court committed an illegality, material irregularity and mistake of law by dismissing the application on the ground that the defendants had not challenged the report of Technical Expert PW-3 Rohit Kathuria, and for absence of due diligence on the part of the defendants and also for not filing any expert report in evidence during trial, despite availing of opportunity to lead evidence, and further the report is not required for adjudication of the controversy between the parties, prayer of defendants to appoint Local Commissioner is not sustainable.

14. Learned counsel for the defendants has submitted that claim by the plaintiff for damages has been set up on the basis of permanent damage caused to the building constructed by the plaintiff and that in case damage, if any, has been caused and the same is permanent in nature, which has compelled the plaintiff to abandon the said building, such damage must be visible and in existence even on date.

15. Learned counsel for the defendants has further submitted that keeping in view the nature of the fact

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required to be ascertained for deciding the controversy between the parties, time spent between the first report of private expert and the report proposed to be called through Engineer/ Commissioner, as on date, shall not make any difference, because it is not a case where the utility of subject matter, i.e. the building alleged to have been damaged, rendering the same inhabitable, is going to be diminished by afflux of time, and the permanent damages to the building, if any, are expected to be in existence as on date. Even otherwise, the Commissioner can be directed to mention in the report specifically as to whether there is possibility of reduction of damage with passage of time, if any, caused at the time of construction of building by the defendants adjacent to the property of the plaintiff alleged to have been damaged.

16. It has further been submitted by the learned counsel for the defendants that no prejudice is going to be caused to the plaintiff as the plaintiff shall have right to file objection to the report, if need be, by taking help of other expert in the field and the parties/Court shall have right/power to call the Commissioner as a witness for cross-examination on that count or for any other purpose to rebut the report or to controvert the findings of the Commissioner.

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17. Learned counsel for defendants has further submitted that it is duty of the Court to ascertain the truth and for lapse on the part of Advocate, particularly keeping in view the status of the parties, should not come in the way for doing substantial justice after ascertaining the truth.

18. Learned counsel for the defendants to substantiate plea for appointment of Local Commissioner has placed upon judgments of Supreme Court in Radhey Shyam Rastogi v. Ashish Kumar and another, (2008) 10 SCC 225; Sanjay Kumar Singh v. The State of Jharkhand, (2022) 7 SCC 247; and judgment of Punjab and Haryana High Court in CR No.7051 of 2014 (O&M), titled as Balkar Singh v. Gian Singh and another, 2016(1) PLR 732.

19. Learned counsel for the plaintiff has justified the impugned order, passed by the Additional District Judge, by referring judgments passed by High Court of Judicature at Bombay (Aurangabad Bench) in WP No.3456 of 2007, titled as Pandurang Nandlal Chandak and another v. Sandip Mukundrao Pensalwar and another, decided on 27.11.2008; and High Court of Madhya Pradesh in Miscellaneous Petition No.2963 of 2021, titled as Smt. Neelam Gupta and another v. Nagar Palik Nigam and others, decided on 5.8.2022.

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20. It has been canvassed by learned counsel for the plaintiff that it is settled law that by appointing a Local Commissioner, under Order 26 Rule 9 CPC, the Court is not to be used as a facilitator for collection of evidence in favour or against any party. No doubt, for removing the doubt or ascertaining factual position on the spot or determining boundary dispute between the parties, the Court may suo moto or on application of any party can appoint a Local Commissioner, but subject to the condition that such report was considered by the Court necessary for complete finding and proper adjudication of the controversy between the parties.

21. It has been further submitted by learned counsel for the plaintiff that it is also not the case that it is considered by the Court that the report proposed to be placed on record as a report of Local Commissioner, is required by the Court for deciding the controversy between the parties or for any other substantial cause.

22. Judgment in **Sanjay Kumar Singh's** case deals with an application filed under Order 41 Rule 27 CPC alongwith the appeal, whereas, in present case, defendants have filed an application under Order 26 Rule 9 CPC without placing on record of the Trial Court or the first Appellate Court any

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document controverting the report of expert placed on record by the plaintiff. Now, defendants intend to controvert report of expert by way of report of Local Commissioner, seeking appointment of the Local Commissioner by the Court, that too, after four years of filing the appeal. It is a case where the application was filed under Order 41 Rule 27 CPC for leading additional evidence, which, despite due diligence, could not be produced by them.

23. In **Balkar Singh's** case, it was held as under:

“..... that identification of a physical feature in a suit where there is a justifiable apprehension expressed that wall is likely to be demolished and that physical features require to be gathered, specially when the decree the defendants claimed to have obtained against the plaintiff has not become final and there is an application for setting aside the same.

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In such a situation, the court should have allowed the commission to be issued so as to assist the court in addressing the controversies. No prejudice could be caused to the respondents, but n the other hand, it will go a long way to assist the court to address the controversy between the parties.”

24. In **Radhey Shyam Rastogi's** case, Local Commissioner was appointed by the Court to determine the condition of the building as the claim of landlord was that building was dilapidated and in dangerous condition requiring reconstruction and there were reports obtained by the

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application from a private Architect, who, in his report, had indicated that disputed premises was in a dilapidated and dangerous condition, on the basis of which the authority had allowed the eviction petition and in those circumstances application was filed before the Appellate Authority by the person who was evicted on the basis of report of private Architect. The application was rejected by the Appellate Authority and thereafter by the High Court, but was allowed by the Supreme Court in following terms:

“3. The application filed by the respondent was, however, opposed by the appellant by filing a written objection in which the ground of non-compliance of mandatory provision of Rule 17 framed in the Act was taken. However, during the pendency of the application before the prescribed authority, the respondent, without obtaining any order or direction from the prescribed authority, had filed a report obtained from a private architect who, in his report, indicated that the disputed premises was in a dilapidated and dangerous condition. Finally, on 29th of November, 1997, the prescribed authority allowed the application and passed an order of eviction against the appellant. An appeal was carried by the appellant before the learned District Judge against the order of eviction passed by the prescribed authority.

4. During the pendency of the appeal before the appellate court, the appellant filed an application for appointment of an Advocate/Engineer Commissioner to carry out an inspection of the disputed premises and submit a report stating therein whether the disputed premises was in a dilapidated and dangerous condition for which demolition and reconstruction was required which was the main ground for eviction of the appellant from the disputed premises under the Act. This application for appointment of a commissioner was, however, rejected by the Appellate Court and subsequently by an order dated 6th of September,

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2003, the appeal filed by the appellant against the order of eviction passed by the prescribed authority was also dismissed.

5. Feeling aggrieved and dissatisfied with the final order of the Appellate Court, a Writ Petition was moved before the High Court which came to be registered as W.P. No. 41799/2003. Before the High Court, the appellant not only challenged the order of the Appellate Court but also submitted that an Advocate/Engineer Commissioner be appointed for the purpose of finding out whether the disputed premises is in a dilapidated condition and, therefore, required demolition and reconstruction. However, while disposing of the writ petition the High Court passed an order which is to the following effect:

“In the changed circumstances and in view of the subsequent events, in our opinion, the proceedings before the Court below may go on. There is no justification for staying the proceedings in the writ petition even after 25 years of filing of the application under Section 21 of the Act on merely interlocutory order. The costs of the reconstruction is increasing day by day. For the reason stated above, the writ petition is dismissed.”

6. A plain reading of this order would show that the High Court did not apply its mind while disposing of the writ petition because, while passing the aforesaid order, the High Court in fact was under a wrong impression that the order rejecting the prayer of the appellant for appointment of an Engineer/Advocate Commissioner was not challenged in the said writ petition which was admittedly not the position.

7. Be that as it may, in the present case, we are of the view that since the eviction of the appellant from the disputed premises was based on the ground mentioned herein earlier, namely, dilapidated and dangerous condition requiring reconstruction, it would be fit and proper that an independent Engineer/Advocate Commissioner is appointed by the High Court for coming to a proper finding in that respect. However, since the matter has already taken for more than twenty five years, we are of the view that the

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High Court should appoint an Engineer Commissioner for the above purpose and direct the said Commissioner to submit a report within six weeks from the date of passing of an order appointing an Engineer Commission and then after receiving a report from the Commissioner, High Court shall decide the writ petition which was filed against the final order of eviction after giving hearing to the parties and after passing a reasoned order in accordance with law positively within two months from the date of submitting the report by the Engineer Commissioner."

25. In present case, damages have determined on the basis of a report of private Engineer fastening the liability upon the defendants to pay the same. Appeal is pending before the first Appellate Court.

26. The facts and circumstances of the present case are similar to that of **Radhey Shyam Rastogi's** case referred supra.

27. As the present case is squarely covered by the facts and circumstances of the judgment passed by the Supreme Court in **Radhey Shyam Rastogi's** case, there is no need to discuss other judgments, referred by the learned counsel for the parties.

28. In present case also, damages have been fastened on the defendants, on the ground that their omissions and commissions have caused damage to the building of the plaintiff, rendering the same uninhabitable. The finding is based upon report of an expert, prepared and issued by a

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private Engineer. Therefore, like Radhey Shyam Rastogi's case, it would be fit and proper to appoint an independent Engineer/Commissioner for placing on record proper finding with respect to condition of building of the plaintiff, particularly with respect to damages, if any, caused to the building on account of act of omission and commission on the part of defendants.

29. In view of the given facts and circumstances of the present case and the nature of the information sought to be brought on record, it cannot be said *stricto sensu* that appointment of Local Commissioner for the purpose set up in the application would be collection of evidence by the Court, rather, as observed in Radhey Shyam Rastogi's case, a report of an independent Engineer/Commissioner would help the Court for coming to proper finding in respect of damage, if any, caused by defendants to the plaintiff.

30. Accordingly, the Additional District Judge is directed to appoint an Engineer/Commissioner, in accordance with relevant provisions, on the expense of the defendants, for the requisite purpose, with direction to the said Commissioner to submit his report within six weeks from the date of passing order of his appointment and after receiving

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the report of Commissioner proceed further in accordance with law for deciding the appeal pending before him.

31. Local Commissioner/Engineer shall ascertain as to whether after such a long period, damage, if any, caused to the house of the plaintiff is possible to be verified and ascertained; as to whether impact of such damage, if any, caused can be assessed as on date; as to whether damage, if any, was preventable, avoidable on the part of the defendants and was it an interference in free enjoyment of property by the plaintiff on account of omissions and commissions on the part of defendants; as to whether for preventing the damage any action was required at the time of construction of building by defendants; as to whether any action was taken by the defendants or by the plaintiff; amount, if any, spent by the plaintiff for such cure was spent on account of deed of defendants or plaintiff himself was duty bound and responsible for making such arrangement for protecting his building; damage, if any, caused was permanent or temporary.

32. In addition to the above queries, any other query as considered fit by the first Appellate Court after hearing the parties may also be assigned to the Local Commissioner to be appointed. Further, the Local Commissioner/Engineer

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shall not restrict his spot inspection, evaluation, assessment of the property and report only to the questions formulated/ communicated by the Court, but he is also expected to incorporate any further additional relevant facts, information, observation or assessment necessary to be submitted to the Court in reference to the issues of controversy involved between the parties, i.e. alleged damage caused to the property of the plaintiff.

33. Either of the parties should not suffer for long span of time or take advantage of lapse between the damage alleged to have been caused and the inspection/assessment by the Local Commissioner/Engineer.

34. Revision Petition is allowed in the aforesaid terms.

Parties are directed to appear before the Additional District Judge, Paonta Sahib, District Sirmour, Himachal Pradesh, on 28.7.2025.

July 8, 2025^(sd)

(Vivek Singh Thakur)
Judge.